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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE EASTERN DISTRICT OF WASHINGTON

14 THE LANDS COUNCIL; HELLS
CANYON PRESERVATION
15 COUNCIL; and LEAGUE OF
WILDERNESS DEFENDERS –
16 BLUE MOUNTAINS
BIODIVERSITY PROJECT,

17 Plaintiffs,

18 v.
19

20 UNITED STATES FOREST
SERVICE,
21

22 Defendant.

Case No. CV-12-619-LRS

**MEMORANDUM IN RESPONSE TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND IN
SUPPORT OF DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT**

23 COMES NOW Defendant United States Forest Service, by and through its
24 counsel of record, and hereby responds to Plaintiff's Motion for Summary
25

Judgment, and pursuant to Federal Rules of Civil Procedure 12(b)(6) and 56, hereby seeks an order dismissing the above-captioned action in its entirety.

I. INTRODUCTION

The Forest Service completed an exhaustive review of the environmental impacts of the South George Vegetation and Fuels Management Project (“South George Project” or “Project”). Despite this comprehensive review, Plaintiffs challenge the Project under the National Forest Management Act (“NFMA”) and the National Environmental Policy Act (“NEPA”) based on unsubstantiated claims that the Project fails to provide for viable populations of primary cavity excavators because it removes too many snags in a small patch of dry upland forest, that the Project impermissibly authorizes “logging” in protected riparian areas, and that the Forest Service fails to take a hard look at the impacts to potential wilderness areas.

First, Plaintiffs fail to demonstrate how the Project will cause a loss in viability in primary cavity excavators in dry upland forest, let alone the applicable analysis area—the Umatilla National Forest. Second, Plaintiffs attempt to impose the wrong standard to fuel management activities that occur in riparian areas and are confused on which stream Project impacts will occur. Once the appropriate standard is applied to the correct stream, the record demonstrates that the Project complies with the relevant requirements.¹ Finally, Plaintiffs have not demonstrated that the Forest Service analysis was inadequate, or its conclusion arbitrary, that no

¹ AR 7694 defines “Prevent attainment of RMOs” as to “preclude attainment of habitat conditions that meet RMOs. Permanent or long-term modification of physical/biological processes or conditions that determine the RMO feature would be considered to prevent attainment of RMOs.”

1 potential wilderness areas exist in the South George Project Area. As explained
2 below, the South George Final Environmental Impact Statement (“Final EIS”) and
3 Record of Decision fully comply with NFMA and NEPA. The Forest Service is
4 entitled to summary judgment on all claims.

5 **II. BACKGROUND FACTS**

6 The Umatilla National Forest (“Forest”) encompasses approximately 1.5
7 million acres, mostly in Oregon and a small portion in Washington. AR 3045.
8 Analysis of the existing and historical conditions indicates that the upland forests
9 current conditions are contributing to their impaired health and deteriorating
10 ecosystem integrity. AR 29085. Dry upland forest sites support an unbalanced
11 species composition, have too much understory, and are too dense. *Id.* The moist
12 upland forests also have similar concerns. AR 29085-86. These conditions have
13 caused well above normal levels of insect and disease and a departure from
14 historically mixed-severity fire regimes to one characterized by high fire severity.
15 AR 29086.

16 The South George Project proposes to conduct timber harvest and fuel
17 reduction activities on 3,900 acres of upland forests in the Umatilla National Forest.
18 AR 29090. The Project’s purpose, in part, is to manage vegetation to return stands
19 to conditions closer to their historic character and improve stand health and vigor,
20 reduce the risk of catastrophic wildfires, and increase resilience to insect attack by
21 reducing stand density. AR 29086. The vast majority of the stand treatment would
22 be intermediate cutting, consisting of 3,020 of improvement cutting and 80 acres of
23 low thinning. *Id.* Of the 3,900 acres to be treated with some type of timber harvest,
24 926 acres are found in the dry upland forest stands, and the remaining 2,974 acres
25 are found in moist upland forest stands. Of that 926 acres of dry forest being

1 treated, 98.8 acres will be treated using the seed tree method (resulting in the
2 creation of a new stand of trees) while 826.9 acres would be treated using
3 improvement cutting, which maintains minimum stocking levels from the Forest
4 Plan. AR 29273; *see also* AR 29440-29444 (Table B-2).

5 **III. STATUTORY BACKGROUND**

6 **A. The National Forest Management Act (“NFMA”)**

7 Administration of the National Forest System is chiefly governed by NFMA.
8 16 U.S.C. §§ 1600-1614. Forest planning under NFMA is carried out in two stages.
9 *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 728-32 (1998). The first level is
10 embodied by the forest plan, which is a broad, programmatic document. *Id.* at 729-
11 30; 16 U.S.C. § 1604. At the second level, the Forest Service undertakes site-
12 specific actions to achieve the desired conditions in the forest plan. *Ohio Forestry*,
13 523 U.S. at 729-30. Proposed projects must be consistent with the forest plan. *See*
14 16 U.S.C. § 1604(i).

15 In 1995, the Umatilla National Forest Plan was amended by the Interim
16 Strategies for Managing Anadromous Fish-producing Watersheds in Eastern
17 Oregon and Washington, Idaho, and Portions of California (“PACFISH”).
18 AR 9003. PACFISH regulates land management activities in a way that will
19 maintain or improve aquatic habitat. AR 9012. PACFISH establishes riparian
20 management objectives and standards and guidelines for Riparian Habitat
21 Conservation Areas that apply generally to all applicable forests until modified by
22 site-specific information. *Id.*

23 **B. The National Environmental Policy Act (“NEPA”)**

24 NEPA serves the dual purpose of informing agency decision-makers of the
25 environmental effects of proposed federal actions and ensuring that relevant

1 information is made available to the public so that it “may also play a role in both
2 the decisionmaking process and the implementation of that decision.” *Robertson v.*
3 *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA does not
4 mandate particular results or impose substantive environmental obligations on
5 federal agencies. *Id.* at 351-52; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360,
6 371 (1989). Instead, NEPA ensures “that [an] agency will not act on incomplete
7 information, only to regret its decision after it is too late to correct.” *Id.* NEPA
8 requires the preparation of an environmental impact statement (“EIS”) for “major
9 Federal actions significantly affecting the quality of the human environment . . .”
10 42 U.S.C. § 4332(2)(C). In reviewing NEPA decisions, courts evaluate whether the
11 analysis includes a “reasonably thorough discussion of the significant aspects of the
12 probable environmental consequences.” *California v. Block*, 690 F.2d 753, 761 (9th
13 Cir. 1982) (internal quotation marks omitted).

14 **IV. STANDARD GOVERNING REVIEW OF AN AGENCY DECISION**

15 Because the NFMA and NEPA do not provide a private right of action, a
16 district court’s review of an agency’s final decision is reviewed under the
17 Administrative Procedure Act (“APA”). 5 U.S.C. §§ 701-706; *Earth Island Inst. v.*
18 *U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012). The APA imposes a
19 deferential standard of review limited to the determination of whether the agency
20 acted in a manner that was “arbitrary, capricious, an abuse of discretion, or
21 otherwise not in accordance with law.” *Forest Guardians v. U.S. Forest Serv.*, 495
22 F.3d 1162, 1168 (10th Cir. 2007) (citing 5 U.S.C. § 706(2)(A)). Review under the
23 arbitrary and capricious standard “is narrow, and [courts] do not substitute our
24 judgment for that of the agency.” *Earth Island Inst.*, 697 F.3d at 1013 (citing
25 *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)). “This

1 deference is highest when reviewing an agency’s technical analyses and judgments
2 involving the evaluation of complex scientific data within the agency’s technical
3 expertise.” *League of Wilderness Defenders Blue Mountains Biodiversity Project v.*
4 *Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (citing *McNair*, 527 F.3d at 993),
5 overrule on other grounds, *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559
6 F.3d 1046, 1052 (9th Cir. 2009)).

7 The APA directs courts to “review the whole record or those parts of it cited
8 by a party . . .” 5 U.S.C. § 706. Thus, the Court’s review is limited to the
9 administrative record before the agency decision-maker. *See Fla. Power & Light*
10 *Co. v. Lorion*, 470 U.S. 729, 743 (1985). A reviewing court should only reverse an
11 agency’s decision as arbitrary and capricious when “the agency relied on factors
12 Congress did not intend it to consider, entirely failed to consider an important
13 aspect of the problem, or offered an explanation that runs counter to the evidence
14 before the agency or is so implausible that it could not be ascribed to a difference in
15 view or the product of agency expertise.” *McNair*, 537 F.3d at 987 (internal
16 quotations omitted).

17 **V. LEGAL ARGUMENT**

18 **A. The Forest Service Did Not Violate the NFMA.**

19 Consistent with the best available science, the Forest Service did an extensive
20 analysis of historical and current snag density conditions within the South George
21 Project Area, and designed the Project to provide sufficient snag densities for
22 primary cavity excavator habitat. The Project does not threaten primary cavity
23 excavator viability (AR 29273-74) despite a slight decline in snag density in the
24 Project Area. Plaintiffs’ claim that the Forest Service cannot maintain viability
25 because there is currently insufficient snag density in a portion of the Project Area

1 and the Project further reduces snag numbers is unsubstantiated. First, Plaintiffs
2 apply the “viability requirement” to the wrong scale. Second, Plaintiffs’
3 misinterpret the analysis and discussion in the Final EIS. They incorrectly conclude
4 that there are an insufficient number of snags in dry forests to maintain viability.
5 Third, Plaintiffs wrongly presume that any decrease in the snag density must result
6 in a loss of viability. Plaintiffs are wrong on all counts. The Project provides for
7 primary cavity excavator viability and complies with NFMA. AR 29273-74.
8 Plaintiffs’ summary judgment motion should be denied.

9 1. The Viability Requirement Applies Forest-wide.

10 Throughout their memorandum, Plaintiffs assume that the viability
11 requirement found in the 1982 NFMA regulations applies to the Project, and further
12 assume the requirement must be met at the Project scale. *See, e.g.*, ECF No. 22. at
13 13 (“The Forest Service, failed to provide for viable populations of primary cavity
14 excavators that use large snags in dry forest.”). The “viability requirement” was
15 found in 36 C.F.R. §219.19 (1982), which provided that “[f]ish and wildlife habitat
16 shall be managed to maintain viable populations of existing native and desired non-
17 native vertebrate species in the planning area.” The regulations were superseded in
18 2000, *see* 65 Fed. Reg. 67,514 (Nov. 9, 2000), codified at 36 C.F.R. pt. 201 (2010),
19 and the viability requirement “appl[ies] only to the extent they were incorporated
20 into the Forest Plan.” *Ecology Center v. Casteneda*, 574 F.3d 652, 657 (9th Cir.
21 2009).² The plain language of the regulation and the Forest Plan both demonstrate
22 that the 1982 NFMA viability requirement applies forest-wide, and not to a site-

23
24 ² The 2000 planning regulations have themselves been superseded by regulations
25 promulgated in 2012. *See* 77 Fed. Reg. 21162 (Apr. 9, 2012).

1 specific project area. The regulations defined “minimum viable population” as “one
2 which has the estimated numbers of reproductive individuals to insure its continued
3 existence is well distributed in the planning area.” 36 C.F.R. § 219.19 (emphasis
4 added). Those regulations defined “planning area” as “[t]he area of the National
5 Forest System covered by a regional guide or forest plan.” *Id.* § 219.3. Thus, the
6 regulations governing the maintenance of viable populations is directed at the entire
7 Umatilla National Forest, the area of the National Forest System covered by the
8 Umatilla National Forest Plan.

9 Moreover, even if the Umatilla Forest Plan incorporated the viability
10 requirement for primary cavity excavators, it did so at the planning, and not project,
11 level. *See* AR 5171 (“[A]s a minimum, provide the required numbers and sizes of
12 hard snags throughout the Forest to maintain primary cavity excavators at 40
13 percent of their potential population throughout their present range.”) (emphasis
14 added); *see also Earth Island Inst.*, 697 F.3d at 1014-15 (holding that if Lake Tahoe
15 Basin Management Unit Forest Plan incorporated the 1982 regulations, species
16 monitoring requirements were incorporated at the planning level); *Earth Island Inst.*
17 *v. Carlton*, 626 F.3d 462, 470-71 (9th Cir. 2010) (requirement “pertains to the
18 planning area, not the project area at issue”). Moreover, the Forest Plan dictates
19 that any viability requirement for primary cavity excavators is met through
20 providing a sufficient number of snags throughout the planning area, and not by
21 monitoring population levels. *See* AR 5171. Thus, there is no requirement to
22 provide for viability at the project level. As explained below, whether or not the
23 1982 viability requirement applies, the record demonstrates that the Forest Service
24 satisfied the requirement to provide sufficient snag habitat at the Forest-wide level
25 to maintain viable populations.

1 2. The Forest Service Used Best Available Science to Ensure a
2 Sufficient Number of Snags Would Be Retained in the Project
3 Area For Primary Cavity Excavators.

4 The Project proposes to retain 3 snags per acre in harvest units located within
5 dry forest habitat. AR 29269; AR 29273. Plaintiffs claim that the Project cannot
6 provide for viable populations of primary cavity excavators because it cannot
7 provide for 3 snags per acre throughout the entire dry forest area that currently
8 averages 1.1 snags per acre. ECF No. 22 at 16. Plaintiffs also argue that the Project
9 will also threaten viability because it will further reduce the number of snags in dry
10 forest by removing snags greater than 21 inches dbh (“large snags”), thinning green
11 trees that might become future snags, and reducing snags through the use of
12 prescribed burning. ECF No. 22 at 17. Plaintiffs are incorrect.

13 a. The Project retains sufficient snag density to maintain
14 adequate habitat for primary cavity excavators Forest-
 wide.

15 In 1995, the snag retention standards of the Umatilla Forest Plan were
16 amended by the Revised Continuation of Interim Management Direction
17 Establishing Riparian, Ecosystem and Wildlife Standards for Timber Sales
18 (“Eastside Screens”), which directs the Forest Service to use best available science
19 to maintain snags and green replacement trees greater than 21 inches diameter at
20 breast height (“dbh”) at 100 percent potential population levels of primary cavity
21 excavators. AR 9486; AR 9543. The Forest Service applied methods consistent
22 with the best available science in Rose, *et al.* (2001) to determine a reasonable
23 number of snags that harvest units in the South George Project should leave to
24 provide habitat for primary cavity excavators. AR 29269; *see also* AR 25853
25

1 (stating that the Project does “not rely on current forest plan snag and down wood
2 standards”).

3 Consistent with methodology described in Rose, *et al.*, AR 14626-30, the
4 Forest Service used current vegetation survey (“CVS”) data from the Asotin
5 Watershed, *see* AR 25317-349, and snag data in the Decayed Wood Advisor
6 (“DecAID”) that was collected from unharvested areas over the entire Blue
7 Mountains to compare the current and historical³ (or reference) snag density and
8 distribution in the Project Area by both forest vegetation group and snag diameter.⁴
9 *See* AR 29269; *see also* AR 29270-72 (Figures 3-8 – 3-11). For the dry forest
10 vegetation group, the comparison of historical and current snag density and
11 distribution demonstrates that there currently are “areas with higher snag densities
12 than reference conditions on a small percent of dry forest” while the amount of dry

13
14 ³ Historical conditions are determined by looking at the historical range of variation,
15 which uses reference conditions pertaining to the pre-settlement era—the mid-1800s
16 for the northern Blue Mountains. AR 29058-59. Here, the reference condition was
17 determined from data from unharvested areas, which is comparable to the historical
18 conditions. AR 29269.

19 ⁴ The Forest Service also utilized other methodologies recommended by Rose, *et al.*,
20 such as considering the fall rate of snags, the rate at which green trees would reach
21 certain diameters and function as replacement snags, and implementation of
22 monitoring of snag and live tree habitats. *See* AR 14629 (Rose et al, 2001); AR
23 7275-79 (Interim snag guidance); AR 29123-24 (FEIS – Project Design Features
24 and Management Requirements); AR 5319 (Forest Plan Monitoring for Dead and/or
25 Defective Tree Habitat).

1 forest with lower large snag density is “about 50% below expected under natural
2 conditions.” AR 29269; *see also* AR 29270 (Figures 3-8 and 3-9). “[A]reas with
3 higher snag densities than reference conditions . . . likely reflects patchy past insect
4 and disease infestations that occurred in the 1980s and early 1990s.” AR 29269.

5 Plaintiffs argue that it is not possible for the Project to provide for an average
6 of 3 snags per acre when only 1.1 snags per acre exist on average in dry forest. ECF
7 No. at 16. But the Project does not propose to provide 3 snags per acre for the
8 entire dry forest land (2,950 acres). Rather, it proposes to retain a minimum of 3
9 snags per acre in dry forest harvest units. AR 29269; AR 29273. And it does not
10 need to do more order to provide adequate snag habitat. First, the reference
11 conditions show that historically there was a large amount of dry forest land in the
12 Project Area with no large snags per acre, and the current amount of dry forest land
13 in the Project Area with no snags per acre is close to the reference conditions.⁵

14
15 ⁵ The difference between 80 percent and 75 percent of land with no snags per acre
16 may not be significant, given that determination of reference conditions (condition
17 in the distant or historical past) are limited by lack of historical data, difficulties in
18 interpreting the historical record, and societal limitations. AR7596 (Morgan et. al.
19 1994). Because determination of the historical range of variability depends on the
20 selection of the spatial and temporal scales (AR7592-93), and because development
21 of any particular stand of trees may progress over several hundred years, a
22 variability of five (5) percent in the acreage within a watershed having zero snags
23 may mean little. Plaintiffs’ alarm over a five percent range of variability seems
24 unwarranted (and certainly lacks adequate foundation) when one considers what
25 HRV encompasses and the limitations of accurately determining HRV.

1 AR29269; AR29270 (Figure 3-9). Notably, the amount of dry forest with no snags
2 per acre will not increase after Project implementation. AR29273. Thus, the
3 amount of dry forest with no snags per acre after Project implementation will remain
4 within the historical range. Second, as explained above, there is currently an
5 overabundance of acres in dry forests with high large snag densities (>4 snags/acre),
6 and a deficit of acres with less than 4 large snags per acre as compared to the
7 reference condition. AR 29269; AR 29270. The Project may lead to a more natural
8 distribution of snags by increasing the number of acres with 2-4 snags per acre by
9 removing some large snags, but retaining a minimum of 3 large snags per acre in
10 harvest units. AR 29273. “Managing forests within or toward the historical range
11 of variability should provide habitat for primary cavity excavators.” AR 29273.
12 Third, the reference condition shows that there is a wide range of snag densities in
13 the Project Area. AR29268, *see also* AR 29270-72. Thus, even if the Forest
14 Service could provide 3 snags per acre in the entire dry forest area, it would not be
15 desirable to do so.

16 In addition to moving the large snag density and distribution in dry forest area
17 toward its historical condition, the Project leaves smaller diameter snags (10 to 19
18 inches dbh) that are also used by primary cavity excavators, retains “all functioning
19 snag habitat (broken top, signs of excavation, etc) . . . wherever possible,” and
20 leaves most large trees (>21 inches dbh) as part of the replacement tree stock for
21 future snag development. AR 29269; AR 29273.

22 The Forest Service also analyzed snag density and distribution at the
23 Watershed level, differentiating between three potential vegetation groups and
24 diameter classes. AR 29269 (Table 3-69). The South George Project also evaluated
25 snag distribution Forest-wide, using 1992 and updated 2002 data. AR 23292. The

1 analysis shows that the Project will provide snag habitat suitable for primary cavity
2 excavators.

- 3 b. The Project will not cause a significant reduction in future
4 snags due to thinning or prescribed burning.

5 The Final EIS demonstrates that the Project is designed to provide for a
6 sufficient number of future snags so as to satisfy the Forest Plan and NFMA.
7 Plaintiffs first argue that the Project will harvest large trees (>21 inches dbh) in dry
8 forest and that thinning activities will reduce the number of trees that might
9 otherwise become future snags. ECF No. 22 at 17. But the silvicultural
10 prescriptions⁶ calls for retaining most large trees and leaving overly dense stands in
11 a “fully stocked” condition. AR 29273. While some green trees will be removed,
12 the fully stocked stands, which meets snag replacement objectives, will provide a
13 sufficient number of trees that could become snags in the future. AR 29273. In
14 *Casteneda*, the Ninth Circuit held that the Forest Service did not violate NFMA by
15 counting acres toward the forest plan old growth standard which did not currently
16 qualify as old growth but would grow in future replacement old growth. 574 F.3d at
17 662.

18 Plaintiffs also allege that prescribed fire will significantly reduce snag
19 densities. ECF No. 22 at 18. While the threat to snag retention is slash piles (AR
20 29273) and prescribed fire may result in some snag loss, the Project is designed to
21 minimize that loss. AR 29273 (“Slash from harvest within units will not be piled
22 against snags to help reduce [snag loss].”); AR 29122 (same). Moreover, prescribed

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24 ⁶ Thinning is an intermediate treatment whereby some trees are removed to modify
25 the growth, quality, vigor, composition, or structure of a forest. AR 29107.

1 burning may create additional snags where it creeps into forested areas. *Id.*; see
2 also AR 29249 ; AR 20332-38 (stating that prescribed fire is likely to kill some live
3 standing trees [either within a treatment unit or at the unit's edge] and create snags
4 as it is to destroy snags).

5 Thus, although the Plaintiffs allege that any reduction in snag density fails to
6 satisfy NFMA, they provide no credible argument that the Project does not
7 sufficiently provide for conditions to meet snag density and distribution
8 characteristics to provide for primary cavity excavator habitat in the future.

9 3. Viable Populations of Primary Cavity Excavators Will be Maintained
10 Forest-wide.

11 Despite the fact that there may be a small decrease in snag numbers in harvest
12 units, (AR 29273), the record demonstrates that the Project is moving the forest
13 within or towards its historical conditions, which “should provide habitat for
14 primary cavity excavators.” AR 29273. All told, Plaintiffs’ focus on 926 acres of
15 dry forest that they allege will not meet the viability requirement ignores the
16 contribution to habitat made throughout the Project Area, and over one million acres
17 of forested land on the Umatilla National Forest that currently provides suitable
18 habitat for primary cavity excavators. AR 29268 (“Forest-wide, snag densities are
19 similar to reference values. This would indicate that overall available snag habitat
20 is contributing to viable populations of primary cavity excavators.”). The entire
21 3,900-acre Project “would affect less than 1 percent (0.006) of forested land on the
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1 Umatilla National Forest.”⁷ AR 29274. The Project Area, including dry forest land,
2 will still contribute to primary cavity excavator habitat by moving current
3 conditions closer to historical ones despite the potential for some minor reduction in
4 snag density in the Project Area. AR 29273. “That a proposed project involves
5 some disturbance to the forest does not prohibit the Forest Service from assuming
6 that maintaining a sufficient amount of suitable habitat will maintain a species’
7 viability.” *McNair*, 537 F.3d at 997. Thus it was entirely reasonable for the Forest
8 Service to conclude that the “small negative habitat trend is too small to cause a
9 change in primary cavity excavator population and continued viability is expected.”
10 AR 29274. Plaintiffs simply disagree with the Agency’s conclusions, but that does
11 not demonstrate a violation of NFMA. Where resolution of such an issue requires a
12 high level of technical expertise, the Court should defer to the informed discretion
13 of the responsible federal agency. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360,
14 377 (1989); *Presidio Golf Club v. Nat’l Park Service*, 155 F.3d 1153, 1160 (9th Cir.
15 1998). Summary judgment in favor of the Forest Service is warranted.

16 B. The South George Project Is Consistent With PACFISH, and Thus
17 Complies With NFMA.

18 The South George Project is consistent with PACFISH standards and
19 guidelines for fuel management projects in riparian areas. Although the Project
20 does allow non-commercial fuel and fire treatments in 25 acres of forest next to an
21 unnamed tributary to George Creek, an area defined under PACFISH as a Riparian
22 Habitat Conservation Area, such activities are allowed under PACFISH fuel

23 ⁷ Plaintiffs only argue that the Forest Service fails to provide for viability on 926
24 acres of dry forest. ECF No. 22 at 18-19. Thus, the percent of allegedly degraded
25 habitat is even smaller.

1 management standard and guideline FM-1, so long as the management action does
2 not prevent the attainment of Riparian Management Objectives.⁸ The Forest
3 Service exhaustively analyzed the impacts of the Project on Riparian Management
4 Objectives and reasonably found that the Project will not prevent their attainment.
5 Despite this analysis, Plaintiffs challenge that conclusion. Plaintiffs rely on the
6 wrong standard and guideline, and misinterpret the data and analysis in the FEIS.
7 Plaintiffs have failed to demonstrate how the Project is inconsistent with PACFISH
8 and violates NFMA. Their motion for summary judgment as to this claim should
9 therefore be denied.

10 1. PACFISH Allows Fuel Management Activities to Proceed In
11 Riparian Habitat Conservation Areas Where the Activity Will
12 Not Prevent the Attainment of Riparian Management Objectives.

13 PACFISH provides federal land managers guidance to protect and restore
14 anadromous fish-producing watersheds. It does not prohibit timber projects and
15 activities within Riparian Habitat Conservation Areas.⁹ Rather, PACFISH provides

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17 ⁸ PACFISH defines “prevent attainment of [Riparian Management Objectives]” as to
18 “preclude attainment of habitat conditions that meet [Riparian Management
19 Objectives]. Permanent or long-term modification of physical/biological processes
20 or conditions that determine the [Riparian Management Objective] feature would be
21 considered to prevent attainment of [Riparian Management Objectives].” AR7964.

22 ⁹ Riparian Habitat Conservation Areas are defined under PACFISH as “portions of
23 watersheds where riparian-dependent resources receive primary emphasis.”
24 AR9107. A riparian area is a “geographic area containing an aquatic ecosystem and
25 the adjacent upland areas that directly affect it.” *Id.*

standards, guidelines, and procedures to follow for land management activities within Riparian Habitat Conservation Areas that may pose an unacceptable risk to anadromous fish stocks. AR 9053; *see also* AR9138.

First, PACFISH delineates riparian goals that “establish a common set of characteristics of healthy, functioning watersheds, riparian areas, and associated fish habitats.” AR9045. Second, PACFISH establishes Riparian Management Objectives. Riparian Management Objectives are “measurable habitat parameters that together define good anadromous fish habitat and serve as indicators against which attainment, or progress toward attainment, of the goals can be measured.” *Id.*

There are six landscape-scale Riparian Management Objectives: (1) pool frequency; (2) water temperature; (3) large woody debris; (4) bank stability; (5) lower bank angle; and (6) width-depth ratios. AR 9135. PACFISH provides specific measures for each Riparian Management Objective that can be modified if warranted after a watershed analysis or specific stream data. AR 9134.

Finally, PACFISH establishes standards and guidelines for a variety of land management activities (e.g., timber, fire and fuels, roads, grazing, etc.) that provide management direction believed necessary to meet the riparian goals and Riparian Management Objectives. AR 9045; *see also* AR 9138-47 (list of standards and guidelines for various management activities). Land management projects, such as the South George Project, are entirely appropriate within Riparian Habitat Conservations Areas so long as they meet the applicable PACFISH standards and guidelines for a particular management activity.

2. The Forest Service Properly Applied PACFISH Standard FM-1 to the South George Project.

The Forest Service developed the Project applying PACFISH standard FM-1, so that the Project will not prevent the attainment of Riparian Management

Objectives. AR 29169 (stating the “fuels treatment would not be expected to prevent attainment or retard recovery of the water temperature”). The Forest Service properly applied this standard because the Project only proposes to do fire and fuels treatments within the Riparian Habitat Conservation Area.¹⁰ Despite the Forest Service’s disclosure in the FEIS of the purpose of the treatments in riparian areas and what standard it was applying, Plaintiffs insist that the South George Project violates PACFISH because it did not follow standards and guidelines for timber management (TM-1) or general riparian area management (RA-2). ECF No. 22 at 21. Plaintiffs, nonetheless, provide no credible argument as to why the TM-1 and RA-2 standards should be applied to the Project, or why the FM-1 standard was inappropriate in this case. *See Id.* at 21-27. The purpose of the South George Project is, among others, to “improve forest health, vigor, and resilience to fire, insects, and disease.” AR 29060. The Project’s vegetation treatments are designed to provide three fire-related benefits: (1) reduce fuel loading that would facilitate reintroduction of low-intensity fire into the ecosystem; (2) reduce ladder fuels to lower the risk of fire spreading into the canopy; and (3) reduce fuels that contribute to uncharacteristically high wildfire intensity and extensive resource damage. AR 29062; AR 29116.

Specifically within the Riparian Habitat Conservation Area, the Project proposes to non-commercially treat 25 acres of forest along a tributary to George Creek. AR 29168. The treatment removes trees from 4 to 18 inches dbh along 0.6

¹⁰ FM-1 allows fuel and fire treatments to occur in Riparian Habitat Conservation Areas as long as treatments are designed, so “as not to prevent attainment of Riparian Management Objectives, . . .” AR 9144.

1 miles of either side of the tributary, and is designed specifically to reduce the
2 probability of crown fire initiation by treating ladder fuels, and reduce crown fire
3 spread by disrupting the continuity of the upper canopy.¹¹ AR 29168; AR 29487;
4 AR 29791. Notably, no harvest other than fuel treatments will occur within the 25-
5 acre riparian area.¹² AR 29118; AR 29170; AR 29487.

6 Plaintiffs provide no reason or rationale of why any PACFISH standards
7 other than FM-1 should apply to the treatments proposed in Riparian Habitat
8
9
10

11
12 ¹¹ A crown fire is defined as a fire that spreads across the tops of trees or shrubs
13 more or less independently of a surface fire. Ladder fuels are combustible materials
14 that provide vertical continuity between vegetation strata and allow fire to climb
15 into the crowns of trees or shrubs with relative ease. AR 10876-77.

16 ¹² The fact that the treatment is a “prototype to examine whether limited [Riparian
17 Habitat Conservation Area] treatments are warranted or advisable in the future,” AR
18 29448, is irrelevant to the inquiry of which PACFISH standard and guideline
19 applies. *See* ECF No. 22 at 23 n.8 (arguing that PACFISH does not permit
20 “experimental logging or as a case study”); *id.* at 24 (same); *id.* at 25 n.11 (same).
21 The relevant question as to whether the activity is allowed in Riparian Habitat
22 Conservation Areas and under what conditions is what type of treatment is being
23 applied (e.g., timber management, fire and fuels management, etc.). *See* AR 9138-
24 47 (listing standard and guidelines by management activity type). The treatments
25 here are clearly for fire and fuels management.

1 Conservation Areas under this Project.¹³ See ECF No. 22 at 21-27. The Forest
2 Service disclosed the nature of the treatments along the tributary as specifically
3 designed to manage fire and fuels, and consistent with PACFISH requirements and
4 as explained below, designed the treatments so as to comply with this standard's
5 requirement to not prevent the attainment of Riparian Management Objectives. The
6 Agency's application of the Forest Plan is subject to deference and should not be
7 second guessed by this Court. *McNair*, 537 F.3d at 993.

8 3. The Project Is Consistent With PACFISH Because It Will Not
9 Prevent the Attainment of Riparian Management Objectives For
10 Water Temperature.

11 The Project does not prevent the attainment of Riparian Management
12 Objectives, and thus is consistent with PACFISH and complies with NFMA. See
13 AR 29168-175. In particular, Plaintiffs argue that the Project will cause a
14 temperature increase in George Creek, a stream that is already out of compliance
15 with the Riparian Management Objective for temperature,¹⁴ and will thus "retard . . .
16 attainment of the PACFISH [Riparian Management Objective] for temperature" and
17 violate NFMA. ECF No. 22 at 26. Plaintiffs are wrong. Not only are they applying
18 the wrong standard, as discussed above, but they are misinterpreting the effects
19 analysis.

20
21 ¹³ Because TM-1 does not apply, the Forest Service did not need to "articulate[] a
22 reason why logging is 'needed to attain Riparian Management Objectives.'" ECF
23 No. 22 at 24.

24 ¹⁴ The Riparian Management Objective for water temperature aims for "no
25 measurable increase in the maximum water temperature." AR 9135.

1 As explained above, the proper PACFISH standard to apply to the Project is
2 FM-1, which allows fire and fuel treatments in Riparian Habitat Conservation Areas
3 where treatments do not “prevent the attainment of Riparian Management
4 Objectives.” AR 9144. The hydrology report and FEIS demonstrate that the Project
5 will meet the Riparian Management Objective because it will not cause an increase
6 in the temperature of George Creek. *See* AR 26798-806; AR 29168-175. Although
7 the Project proposes to remove 20 percent of the basal area and reduce stand canopy
8 closure by 10 percent within the Riparian Habitat Conservation Area of the tributary
9 to George Creek, AR 29169, and although, as a result, the Project may slightly
10 increase the temperature of the non-fish bearing tributary, the Project is not
11 expected to impact the temperatures of George Creek for several reasons.
12 First, the treatments are specially designed to limit shade reduction and follow best
13 management practices for shade. AR 29168-69. For example, decline in canopy
14 cover on the northwest facing, or shade-producing, slope will not exceed 10 percent,
15 AR29118-121, thus, limiting any potential temperature increases. AR 29169.

16 Second, topographical and tributary features of the particular location, such as
17 channel characteristics, and stream width and orientation, function such that any
18 slight temperature increase in the tributary as a result of the treatments make it
19 “unlikely that there would be a measureable water temperature increase in George
20 Creek.” AR29169. Mid-summer flows in the tributary, when peak stream
21 temperatures occur, are low, and only make up about one-quarter of the total flows
22 of George Creek at its confluence. AR 29169. Thus, there is a significant dilution
23 effect. Furthermore, the tributary flows for one-quarter mile before draining into
24 George Creek, and drains to the northeast where there is significant shade from
25 vegetation. The area at the Forest boundary where the tributary drains into George

1 Creek has shown mid-summer water temperatures as low as 9° C (48.2° F), AR
2 29169, far below the mid-summer maximum average water temperatures of 56-64°
3 F in George Creek.¹⁵ AR 29164. This demonstrates that any slight temperature
4 increase in the tributary is not likely to be felt in George Creek by the time the water
5 reaches the confluence.

6 Based on the above analysis, was reasonable for the Forest Service to
7 conclude that it is “unlikely that there would be a measurable water temperature
8 increase in George Creek from [Riparian Habitat Conservation Area] fuels
9 treatments” and the Project would not prevent or retard the attainment of Riparian
10 Management Objectives. AR 29169. The Forest Service’s analysis demonstrates
11 that the Project is consistent with PACFISH standard FM-1, and thus complies with
12 NFMA. As such, no forest plan amendment is required to proceed with the Project.
13 *See* ECF No. 22 at 27.

14 C. The Forest Service Adequately Analyzed the Project Area For the
15 Presence of Potential Wilderness Areas in Compliance With NEPA.

16 The Forest Service adequately analyzed the Project Area for the possible
17 presence of potential wilderness areas, and reasonably determined that none were
18 present. Plaintiffs argue that had the Forest Service not arbitrarily excluded 300-
19 foot roadside buffers that allegedly contain unique unforested areas in determining
20 potential wilderness areas, it “would most likely put the South Fork Asotin Creek
21 roadless area above 5000 acres,” thus automatically making it a potential wilderness
22
23

24 ¹⁵ Temperatures are seven-day summer maximum averages from 1992-2003. AR
25 29164.

1 area under the inventory criteria.¹⁶ ECF No. 22 at 30. Plaintiffs are incorrect for
2 two reasons.

3 Using a series of map overlays containing data regarding Inventoried
4 Roadless Areas, designated Wilderness areas, forest roads, and areas of past harvest,
5 the Forest Service determined the size and location of areas within the Project Area
6 that were undeveloped, and thus could possibly qualify under the inventory criteria
7 for a potential wilderness area. *See* AR 29497-521. Because road maintenance,
8 such as brush clearing and hazard tree removal, occurs that creates “stumps that are
9 evident and recognizable, the Forest Service excluded a 300-foot roadside buffer¹⁷
10 from the undeveloped lands acreage.” AR 29499; *see also* AR 29508, 29513-514.
11 The Forest Service recognized that “stumps are not present along every mile of

12 ¹⁶ The Forest Service Handbook (“FSH”) lists inventory criteria for potential
13 wilderness. *See* FSH 1909.12, Ch. 71, § 71.1. To be considered a potential
14 wilderness area, undeveloped areas (i.e., areas without evidence of past harvest and
15 without presence of roads), AR 29502, must either (1) contain 5,000 acres or more;
16 or (2) contain less than 5,000 acres and meet at least one of three criteria, such as
17 being a self-contained ecosystem. FSH 1902.12, Ch. 71, § 71.1. All undeveloped
18 areas identified in the Project Area, other than the South Fork Asotin Creek area,
19 contained significantly less than 5,000 acres. AR 29502-506. Therefore, the
20 inclusion of the 300-foot roadside buffer into these areas would not increase the
21 acreage to 5,000 acres or more. In addition, the areas do not meet the inventory
22 criteria. *See* AR 26364-66.

23 ¹⁷ The buffer is 300 feet on each side of the road. AR29499; AR 29508; AR 29513-
24 514.
25

1 forest roads,” but with its local knowledge and professional judgment regarding the
2 extent stumps occurred along forest roads, “and to facilitate easy on-the-ground
3 identification of a uniform, measurable boundary along a semi-permanent human-
4 made feature,” the Forest Service set the boundary for each road in the Project Area.

5 AR29499. This method is consistent with procedures in the FSH to remove from
6 the calculation of potential wilderness areas acreage attributed to Forest roads and
7 acreage with evidence of past logging, and to set boundaries “to facilitate easy on-
8 the-ground identification.” AR 29500; *see* FSH 1909.12, Ch. 71, § 71. The
9 Agency’s actions did not fail to account for relevant features and were not arbitrary
10 and capricious.

11 Furthermore, Plaintiffs have not demonstrated how even inclusion of all 300-
12 foot roadside buffer acreage would have pushed the South Fork Asotin Creek area
13 above the 5,000-acre threshold for identification as a potential wilderness area.

14 Moreover, based on Forest Service Handbook direction, the Forest Service
15 delineated the South Fork Asotin Creek area boundaries by “locat[ing] boundaries at
16 prominent natural or semi-permanent human-made features to facilitate easy on-the-
17 ground identification.” AR 25746-748. This excluded several narrow fingers of
18 land that surrounded Forest roads that would have made administration of the
19 potential wilderness area difficult, and thus reduced the potential wilderness area to
20 only 3,310 acres (as compared to the estimated 4,440 acres). *See* AR 29518. Thus,
21 even adding all of the roadside buffer would have made no difference.

22 The Forest Service considered that all roadsides may not have past evidence
23 of harvest but concluded that that roadside buffer should be applied to all roads in
24 the Project Area to facilitate easy on-the-ground identification. AR 29499. The
25 Forest Service adequately disclosed its decision, and this decision is entitled to

1 deference. *McNair*, 537 F.3d at 993. The Court should find in favor of the Forest
2 Service on Plaintiffs' NEPA claim.

3 D. Summary Judgment in Favor of the Forest Service is Warranted On All
4 Remaining Claims.

5 In addition to finding in the Forest Service's favor as to the NEPA and
6 NFMA claims discussed above, the Court also should rule that the remaining claims
7 alluded to in the Complaint but not addressed in Plaintiffs' brief have not been
8 adequately pled and have been abandoned. Judgment should be entered for the
9 Forest Service as to all such claims.

10 In the Complaint (ECF No. 1), Plaintiffs alleged "the defendant has not
11 maintained viable populations of pine marten, pileated woodpecker, northern three-
12 toed woodpecker, or primary cavity excavators . . ." Plaintiffs also allege violations
13 of PACFISH requirements related to grazing and recreation. ECF No. 1, ¶¶ 44-45.
14 The allegations fail to plead sufficient facts to state a claim upon which relief may
15 be granted.

16 The instant complaint is not pleaded with sufficient facts to state viable
17 claims that are plausible on their face. The sum total of the allegations regarding
18 viability of pine marten, pileated woodpecker, and three-toed woodpecker are:

19 the defendant has not maintained viable populations of pine marten,
20 pileated woodpecker, northern three-toed woodpecker, or primary
cavity excavators . . .

21 ECF No. 1, ¶ 35. No other details regarding how the Forest Service failed to
22 address viability for these three species is provided in the Complaint. All that is
23 alleged in paragraph 35 is a legal conclusion insufficient under *Ashcroft v. Iqbal*,
24 556 U.S. 662, 678-79 (2009). The Court should dismiss the NFMA claims
25 regarding pine marten, pileated woodpecker, and three-toed woodpecker, and

1 alleged violation of PACFISH standards for grazing and recreation.

2 Plaintiffs' motion for summary judgment addressed only a limited number of
3 issues when compared to the Complaint in this matter. The remaining claims in the
4 Complaint regarding viability of pine marten, pileated woodpecker, and three-toed
5 woodpecker, and PACFISH requirements related to grazing and recreation should
6 be considered abandoned because they were not addressed in Plaintiffs' motion for
7 summary judgment. *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir.
8 1995); *Head Start Family Educ. Program, Inc. v. Coop. Educ. Serv. Agency 11*, 46
9 F.3d 629, 635 (7th Cir. 1995); *Steeves v. City of Rockland*, 600 F. Supp. 2d 143, 173
10 n. 117 (D. Me. 2009) (citing *Grenier*, 70 F.3d at 678). Plaintiffs may not now rely
11 on these claims. The Court should grant summary judgment to Defendant on the
12 remaining claims.

13 VI. CONCLUSION

14 For the foregoing reasons, the Court should deny Plaintiffs' motion for
15 summary judgment and grant Defendant's motion for summary judgment, and
16 dismiss the case in its entirety.

17 Dated this 2nd day of August 2013.

18
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8 CERTIFICATE OF SERVICE

9 I hereby certify that on August 2, 2013, I electronically filed the foregoing
10 with the Clerk of the Court using the CM/ECF system which will send notification
11 of such filing to the following:
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